



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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PUBLIC SESSION MINUTES

OCTOBER 28, 1993

All the Commissioners, Counsel Farrell, senior staff, and Director of Public Financing Nedda Gold Massar were present.

Chairman McNany called the meeting to order and announced that pursuant to the "Open Public Meetings Act," N.J.S.A. 10:4-6 et seq., special notice of the meeting of the Commission had been filed with the Secretary of State's Office and distributed to the entire State House Press Corps.

The meeting convened at 9:00 p.m. at the New Providence Municipal Center, New Providence, New Jersey.

1. Executive Session

The Commission announced it would convene into Executive Session to consider procedural issues, and subsequently reconvened into Public Session.

2. People for Whitman Committee v. Florio '93, Inc., PF 02-93(G) (Cruz Letter)

The Commission reviewed the Initial Decision in People for Whitman Committee v. Florio '93, Inc. issued by Judge Beatrice Tylutki, ALJ, decided October 27, 1993, Agency Dkt. No. PF 02-93(G).

The counsel for the Complainant was Peter G. Verniero, Esq., and the attorney for the Respondent was Angelo J. Genova, Esq.

The verified complaint by the People for Whitman Committee alleges that a letter sent on or about July 22, 1993, by Felix M. Cruz, Director of the Office of Minority Affairs in the Governor's office (Cruz letter), constitutes a political communication as defined by N.J.A.C. 19:25-11.10(b). The complainant also alleges that since the Cruz letter is a political communication, the entire cost for sending the letter must be allocated against the expenditure limit for the Democratic gubernatorial candidate pursuant to the provisions of N.J.A.C. 19:25-11.11, and the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-47.

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The Respondent, Florio '93, Inc., denied the allegations and among its affirmative defenses states that the Cruz letter does not constitute a political communication pursuant to N.J.A.C. 19:25-11.10(b), that the letter is exempt pursuant to N.J.A.C. 19:25-11.10(c), and that there are constitutional problems with the provisions of N.J.A.C. 19:25-11.10(b).

The Cruz letter was sent to approximately 700 leaders of the Cuban-American community in New Jersey.

The first issue considered by Judge Tylutki involved the question of whether the Cruz letter was sent to an audience substantially comprised of persons eligible to vote for Governor Florio, N.J.A.C. 19:25-11.10(b)2.

Judge Tylutki concluded that the complainant has shown that the Cruz letter meets that part of the four-part political communication test at N.J.A.C. 19:25-11.10(b)2.

The second issue involves the question of whether the communication was undertaken with the cooperation of, prior consent of, in consultation with, or at the request or suggestion of the candidate.

Judge Tylutki concluded that the Cruz letter meets this part of the test in that it was not taken independently of the Governor. The Judge indicated that the Governor has allowed people in his office to speak for him and to represent his positions on various subjects.

Judge Tylutki concluded that this type of consent is sufficient for the purpose of N.J.A.C. 19:25-11.10(b)4.

The final issues involve the questions of whether the letter is exempt under N.J.A.C. 19:25-11.10(c) and whether the political communication regulation is unconstitutionally broad.

Judge Tylutki concluded that the Cruz letter is exempt pursuant to N.J.A.C. 19:25-11.10(c) on the basis that one of its purposes was to announce a governmental event requiring constituents to take prompt action.

In terms of the constitutional question Judge Tylutki determined that this question was beyond the jurisdiction of the OAL.

Judge Tylutki concluded that even though the Cruz letter is a political communication pursuant to N.J.A.C. 19:25-11.10(b), it is exempt pursuant to N.J.A.C. 19:25-11.10(c). The Judge ordered that the verified complaint be Dismissed with Prejudice.

Written exceptions and objections were submitted Peter G. Verniero, Esq., Legal Counsel for People for Whitman. For detailed information please see communication from Peter G. Verniero, to Gregory E. Nagy, Legal Counsel, dated October 28, 1993 and involving exceptions and objections in People for Whitman Committee v. Florio '93, Inc., Initial Decision: Agency Dkt. No. PF 02-93(G) (Cruz).

In sum, the written exceptions and objections note that the political communication regulation's essential purpose is to ensure a level playing field among gubernatorial candidates who receive public matching funds. It states that excepting this communication from the political communication regulation in effect authorizes the use of the Governor's official resources to supplement the \$5.9 million campaign account.

In the exceptions, Mr. Verniero also states that the Cruz letter does not qualify for an exemption reserved only for material circulated for the "sole and limited purpose" of communicating a governmental event requiring constituent action. Mr. Verniero maintains that nothing said in the letter required any action by its recipients nor did it request action.

Mr. Verniero also states that even if a "call to arms" was required, the "call to arms" could have been accomplished without mentioning the Governor.

The People for Whitman requested that the Commission: a) modify the Initial Decision to hold that the Cruz letter is not exempt from campaign reporting; and b) find that the letter's cost be paid for by Florio '93, Inc.

Mr. Verniero and Mr. Genova presented oral arguments which were recorded by a certified shorthand reporter. A transcript of the proceedings is available for public inspection at the Commission offices.

3. Joseph Marion Election Committee v. Florio '93, Inc., PF 04-93(G) (Signs)

The Commission reviewed the Initial Decision in Joseph Marion Election Committee v. Florio '93, Inc. issued by Judge Stephen G. Weiss, A.L.J., decided October 21, 1993, Agency Dkt. No. PF 04-93(G).

The counsel for the complainant was Diana Martinez, Esq., and the counsel for the respondent was Angelo J. Genova, Esq.

The verified complaint alleged that the Respondent was obliged to account for and to reimburse the State Treasury for any and all costs associated with certain signs that had been installed in this State on New Jersey roadways, which signs contained a political communication as defined in N.J.A.C. 19:25-11.10. It was also alleged that the entire cost of design, production, and installation must be allocated against the respondent's gubernatorial expenditure limit pursuant to N.J.A.C. 19:25-11.11.

The Respondent Florio '93 Committee, Inc. denied the allegations, stating that the record in this case is inadequate. Judge Weiss said his decision must relate to whether or not the allegations of the complaint have been proven or a prima facie case has been made out.

With respect to the issue of whether the signs constituted a political communication, Judge Weiss determined that the signs fall within the parameters of the political communication rule. Judge Weiss, in concluding that the signs fell within the scope of the rule, indicated that he next had to determine whether the conditions of the rule have been met.

Judge Weiss considered the four elements of the political communication rule and concluded the following:

1. That the signs were erected after the primary; therefore the communication fell within the timeframe contemplated by the regulation;
2. That the criteria calling for the communication to be circulated or broadcast to an audience substantially comprised of persons eligible to vote for the candidate was not met because of lack of proof;
3. That the communication does contain a statement or reference concerning the governmental or political objectives or achievements of the candidate; and,
4. That no prima facie case has been made out to demonstrate or to require the respondent to move forward to rebut that the communication was made in whole or in part with the cooperation of, prior consent of, in consultation with, or at the request or suggestion of the candidate.

Judge Weiss, determining that two of four criteria have not been met, granted the Respondent's Motion to Dismiss.

Written exceptions to the Initial Decision were submitted by Diana Martinez, Esq.

In sum, Ms. Martinez states that she takes exception to the finding that the proofs are less than overwhelming with respect to location and audience. Ms. Martinez also stated that the Marion campaign takes exception to the finding that the candidate cannot be held responsible for reporting where there is absent some demonstration of candidate participation.

In the exceptions, Ms. Martinez states that she was compelled to proceed without benefit of discovery, that the Commissioner of Transportation serves at the pleasure of the Governor, and that the Department acted to further the interests of the candidate instead of the Governor.

Ms. Martinez, stating that there is no precedent in this matter and little for the Judge to rely on, asked the Commission to not sustain the Judge's dismissal of the case.

Ms. Martinez was not present at the meeting, nor was any other representative on behalf of Joseph Marion Election Committee present. Therefore, no oral argument was made on behalf of the Complainant. Mr. Genova was heard on behalf of the Respondent. A certified shorthand reporter was in attendance to record the proceedings.

4. People for Whitman Committee v. Florio '93, Inc., PF 06-93(G) (Reno Visit)

The Commission reviewed the Initial Decision in People for Whitman Committee v. Florio '93, Inc., issued by Judge Stephen G. Weiss, A.L.J., decided October 26, 1993, Agency Dkt. No. PF 06-93(G).

The counsel for the complainant was Peter G. Verniero, Esq., and for the respondent, Angelo J. Genova, Esq.

The verified complaint by the People for Whitman Committee alleged that the respondent, Florio '93, Inc. had filed its 29-day preelection report on October 4, 1993, failing to include a required allocation for costs associated with the visits to New Jersey by United States Attorney General Janet Reno on September 13, 1993, by United States Interior Secretary Bruce Babbitt on September 28, 1993, and by President William Clinton on October 8, 1993. According to the complainant, all three visits were "political" pursuant to N.J.S.A. 19:44A-1 et seq. and N.J.A.C. 19:25-15.27, the cost of which should have been allocated against the expenditure limit of Candidate Florio and reimbursement made to the appropriate government agency or agencies.

The counsel for the respondent moved to dismiss the verified complaint as it related to President Clinton's visit on the basis that the costs did not have to be reported yet and that the complaint was therefore premature.

Judge Weiss concurred with the respondent and dismissed without prejudice that part of the complaint as it related to the Clinton visit.

The first issue to be decided with respect to the Reno and Babbitt visits is whether the legislative intent throughout the Campaign Contributions and Expenditures Reporting Act requires these visits to be reimbursed.

The complainant cited ELEC v. Brown, 206 N.J. Super. 206 (App. Div. 1985) as support for his argument. Judge Weiss determined that this case, which dealt with a newsletter, was not applicable to this matter, indicating there is no regard as to what Ms. Reno and Mr. Babbitt said during their visits. Judge Weiss also determined that no active participation or involvement by Candidate Florio in planning the visits took place. Judge Weiss indicated that what is important in the Brown case is the fact that each case is fact-sensitive and must be approached on an individual basis.

The second argument involved the question of whether "Political Communication Rule," N.J.A.C. 19:25-11.10, provides persuasive guidance under which the costs of the trips should be adjudged to be allocable against the Governor's campaign expenditure limit. According to the complainant, the post-primary visits to New Jersey by the two cabinet members and their appearances with the Governor during which they spoke about common goals and objectives clearly promoted the Florio campaign agenda through "broadcast" to eligible voters.

Judge Weiss concluded that even if the "Political Communication Rule" applied, there was no "broadcast" of a political communication. He stated

that there is no proof as to any radio or television dissemination of the visits. Judge Weiss concluded that in order to constitute a "broadcast" under the rule there must have been some direct participation by or on behalf of the candidate which would be characterized as initiation of the activity. The candidate has no control over the media. Judge Weiss concluded, therefore, that the "Political Communication Rule" does not apply to this case.

Judge Weiss also distinguished between these visits and earlier visits by Vice President Bush in connection with then-candidate Thomas Kean. He indicated that those visits were designed to advance or promote that candidacy (fundraising and party-building) and constituted situations which were distinct from this present case.

Judge Weiss concluded that an appearance by high-ranking federal cabinet officials in proximity to an election cannot always be construed as political and thereby reportable as an expense to a campaign.

The issue of the constitutionality of the political communication regulation was broached by the respondent. Judge Weiss concluded that he had no jurisdiction to decide upon the constitutional merits of the Commission's political communication regulation.

Judge Weiss, determining that the complainant failed to establish by a preponderance of the credible evidence that the visits by Attorney General Reno and Interior Secretary Babbit, were such as to require that all or a portion of the costs should be allocated against the Florio campaign ordered that the verified complaint filed by the People for Whitman Committee should be dismissed.

Oral arguments were presented by Counsels Verniero and Genova. A certified shorthand reporter was in attendance to record the proceedings.

5. Executive Session

The Commission announced it would convene into Executive Session to review the three cases (PF 02-93(G), PF 04-93(G), and PF 06-93(G)).

6. People for Whitman Committee v. Florio '93, Inc., PF 02-93(G) (Cruz Letter)

Upon returning to public session, on a motion by Commissioner Eldridge, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission modified the Initial Decision in the Cruz matter, and ordered Florio '93, Inc. to amend its campaign reports for the 1993 general election to report costs associated with the circulation and production of the Cruz letter. Because of the minimal amount involved the Commission did not impose a penalty. Other than the modification, the Initial Decision was adopted as the Final Decision in People for Whitman Committee v. Florio '93, Inc., PF 02-93(G).

The Commission modified Judge Tylutki's Initial Decision because it was not satisfied that the sole and limited purpose of the Cruz letter was to communicate a governmental event requiring constituents to take action.

7. Joseph Marion Election Committee v. Florio '93, Inc., PF 04-93(G) (Signs)

On a motion by Commissioner Linett, seconded by Commissioner Eldridge and passed by a vote of 3-0, the Commission adopted Judge Weiss' Initial Decision as the Final Decision in Joseph Marion Election Committee v. Florio '93, Inc., PF 04-93(G).

8. People for Whitman Committee v. Florio '93, Inc., PF 06-93(G) (Reno Visit)

On a motion by Commissioner Eldridge, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission adopted Judge Weiss' Initial Decision as the Final Decision in People for Whitman Committee v. Florio '93, Inc., PF 06-93(G).

9. People for Whitman Committee v. Florio '93, Inc., PF 07-93(G) (Cruz Letter)

Mr. Genova, on behalf of Florio '93, Inc., made a motion to stay the Final Decision in People for Whitman Committee v. Florio '93, Inc., PF 02-93(G).

On a motion by Commissioner Eldridge, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission denied the motion by Mr. Genova for a stay of the Final Decision in the Cruz matter. A transcript of this discussion is available for public inspection at the Commission offices.

10. Adjournment

On a motion by Commissioner Eldridge, seconded by Commissioner Linett and passed by a vote of 3-0, the Commission voted to adjourn at 12:14 a.m.

Respectfully submitted,



FREDERICK M. HERRMANN, PH.D.